No. 2722.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM HANLEY
APPELLANT

VS.

THE PACIFIC LIVE STOCK COMPANY
a Corporation
APPELLEE

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON
FROM THE DECREE ENTERED AUGUST 3, 1915

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PART I.

On Motion To Dismiss Appeal.

In criminal contempts review by the appellate court is had by writ of error. In civil contempts it is had by appeal.

> Gompers vs. Bucks Stove & Range Co., 31 Sup. Ct. Rep. 492.
>
> Wilson vs. Calculagraph Co., 153 Fed. 961.
>
> Clay vs. Waters, 187 Fed. 385, 392.

This rule is in fact conceded by the appellee, the

appellee's motion to dismiss being based on the contention that this present case was one of criminal, rather than civil, contempt.

In the Gompers case above cited, the Supreme Court of the United States, took especial pains to classify contempts into civil and criminal and to point out the earmarks by which each class might be recognized. Prefacing its remarks with the statement that contempts are not wholly civil nor altogether criminal, and that it may not always be easy to classify a case as civil or criminal because it may partake of the characteristics of both, the court said:

> "It is not the fact of punishment, but rather its character and purpose, that forthwith serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefits of the complainant. But if it is criminal contempt, the sentence is punitive, to vindicate the authority of the court."

The court then points out that either class may partake somewhat of the nature of the other, for, where a punishment is purely remedial, there is, as an incident thereto, a vindication of the court's authority, and on the other hand where the punishment is purely punitive to vindicate the authority of the law, yet the complainant nevertheless derives some incidental benefit therefrom because punishment tends to prevent a repetition of the forbidden acts.

It is not possible therefore to classify cases so that they shall be wholly remedial or wholly punitive. The essentials of the case must be looked at, and if they show a case of civil contempt, the case must be so classed, though there may be some elements of criminal contempt involved in it, and vice versa. It is the main characteristics of a case which must govern.

Applying to the present case this important test of whether the object sought was remedial or punitive, we find that every single word in the decree adjuding Hanley in contempt is there for the purpose of affording the complainant a remedy. There is not a punitive element in the decree. Pargraphs I to VII of the decree contain findings of fact; paragraphs VIII to XIV contain the things that are to be done by the defendants to purge themselves of contempt. First (paragraph VIII) Hotchkiss and Thornburg are to remove the Young Dam so that the water can flow down to complainant, and Hotchkiss is to pay one-eighth of complainant's costs. Second (paragraph IX) Carey Thornburg is to remove his dam and pay one-eighth of the costs. Third (paragraph X), the defendant Hanley is to remove the obstructions in his dam in Section 21 and keep that dam open as required by the decree, and is to close his drain ditch so that it shall not divert water from the river, and is to repair the breaks in the river bank, and is to pay the balance of complainant's costs, namely, six-eighths thereof, amounting to $332.80, and is to pay, in addition thereto, the sum of $250.00 *for the use of the complainant*, this latter sum, however, not

to be construed as *wholly compensatory for plaintiff's loss.* Fourth (paragraph XI), defendant Young is to forthwith remove his dam, but is permitted to rebuild his old dam further down the river, provided he builds it so that the water of the river shall not be obstructed thereby, except as permitted by the decree. Fifth (paragraph XII), defendant Thornburg is to remove from the channel of the river the old Voegtly Dam. Sixth (paragraph XIII), defendant Hanley is enjoined from using the Young Dam or the Luig Dam. Seventh (paragraph XIV), defendant Hanley is ordered to remove the remains of the old bridge across the East Fork of the river, which complainant claimed was obstructing the water.

Those are all the requirements of the decree. Everyone of them is for complainant's benefit and therefore purely remedial. Not one of them is punitive. There is no fine of any kind imposed for the benefit of the United States.

The foregoing, of itself, is sufficient to show that the objects of this proceeding were purely remedial and therefore this is a case of civil contempt, reviewable by appeal. But still following the tests laid down in the Gompers case, we find that the court said there, 31 Sup. Ct. Rep., page 499, second column:

> "There is another important difference. Proceedings for civil contempt are between the original parties, and are instituted and tried

> as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

And the court then proceeded to point out that the Gompers contempt proceedings "were instituted, entitled, tried, and, up to the moment of sentence, treated as a part of the original cause in equity"; that the Bucks Stove & Range Company was not merely the nominal but the actual party on the one side, with the defendants on the other; and that the Stove Company acted throughout as complainant in charge of the litigation, and its counsel, acting in its name, made stipulations only proper on the theory that it was proceeding in its own right in an equity case, and not as a representative of the United States, prosecuting a case of criminal contempt. The Supreme Court also pointed out that in the submission of the case before it, the Stove Company appeared as the sole party in opposition to the defendants, and that its counsel, in its name, had filed briefs and made arguments in that court favoring the affirmance of the judgment of the court below.

Now every one of these things that the Supreme Court pointed out as earmarking the Gompers case as one of civil contempt, can be found in this present case. The affidavit of John Gilcrest, which initiated this contempt proceeding, is entitled, in the original cause, and is even carried on the docket of the lower court under the same number as the original cause. (Record p. 14).

This present contempt proceeding was tried as a part of the original cause, and the opinion of the judges on previous contempt proceedings arising under this same decree, were read and the complainant's counsel itself used a map before the court which they secured from the files of the original cause, and the trial court, in determining what record should be presented to this appellate court, ordered that in addition to the printed record, the whole of the original record from the first inception of the main case in 1898, down to the present time, should be sent to this appellate court. The Pacific Live Stock Company acted throughout as complainant in charge of this litigation, as the actual, not the nominal, party, and its counsel, just as the counsel did in the Gompers case, made waivers and stipulations "only proper on the theory that it was proceeding in its own right in an equity case and not as a representative of the United States prosecuting a case of criminal contempt." (Record, pp. 260 and 313. See also signed stipulation p. 3). And the Pacific Live Stock Company is now before this court, just as the Stove Company was before the Supreme Court in the Gompers case, as the sole party in opposition to the defendant Hanley and has filed its brief and is making its argument to dismiss this appeal and affirm the judgment below.

Referring to the fact that this contempt proceeding was entitled in the main cause, we point out that the Supreme Court, commenting on a like state of the record in the Gompers case, said, p. 500 first column:

"This is not a mere matter of form, for

> manifestly every citizen, however unlearned in the law, by inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit."

Following this same line of thought, we say that Hanley was entitled to be apprised by the complainant whether this was a civil or a criminal contempt and that the complainant, having treated the whole proceeding up to the present time as a civil contempt, should not be allowed to so much as open its mouth to argue a motion to dismiss this appeal on the theory that the proceeding was criminal and should have been brought up by writ of error. If this were the only reason why this court should deny the appellee's motion, such reason would be sufficient.

Another earmark of a civil contempt case, as contradistinguished from a criminal contempt, is pointed out by the court in the Gompers case, and that is that in civil contempts, the complainant, if successful, is entitled to costs. (Gompers case, p. 500). But that in criminal contempts costs are not usually paid, and if paid, go to the government. The court pointed out that in the

Gompers case the complainant asked for and got its costs. So in this present Hanley case, the complainant asked for its costs (Mr. Minor's argument p. 460 of the original transcript of the testimony), and the court gave the complainant its costs. (See the decree.)

After showing that the parties in the Gompers case construed it throughout as a civil contempt proceeding, which was a part of the original equity case (just as the parties did in this case) the Supreme Court said, in the Gompers case, page 501:

> "In case of doubt this might, of itself, justify a determination of the question in accordance with the mutual understanding of the parties, and the procedure adopted by them. But there is another and controlling fact, found in the brief, but sufficient, prayer with which the petition concludes."

And the court then proceeded to point out that the prayer showed clearly that remedial relief and not punishment was sought, the concluding words of the prayer being: "That petitioner may have such other and further relief as the nature of its case may require." This was taken to show that a remedy and not a punishment was the essential idea of the case and that therefore it was a civil contempt.

Now in the present case the prayer of the affidavit says only this:

"Wherefore, the said complainant asks that an order to show cause be issued, and that the said defendants be dealt with in such a manner as may be meet in the premises."

But in the argument, in the lower court, Mr. Minor, counsel for the complainant, showed clearly that what the complainant was after was *remedial relief*, for he urged that the court should punish the defendants by compelling them, for that current year of 1915, to leave their dams open during the whole period that the original decree allowed them to keep the dams closed, so that the water which complainant said it had been deprived of in the earlier part of the season might come down to its lands in the later part. This was the only punishment suggested by the complainant. And here are Mr. Minor's very words (page 457 of the original typewritten transcript of testimony in this proceeding on file in this court):

"I come now, if your Honor please, to suggest to your Honor what, in my judgment, should be done in this case. I do not believe these men should be mulcted heavily in damages. I do believe that they should be punished, and I believe this is a case where the punishment ought to go to reimburse the party injured. This court has power to impose a fine, or to punish in any way which it may think proper; and I suggest to your Honor that the rights which these people now have to put in

their boards and to use this water, should be taken from them, and given to the party who has been damaged by their taking his right, or its right. In other words, for this year, your Honor should make some order which would give the Pacific Live Stock Company whatever water it is possible to give them upon their lands at this late period. And the only way in the world to do that, so far as I can see, if your Honor please, is to cut out these dams, take them out absolutely, let the water do down there, and let the Pacific Live Stock Company use such water as it can get for that purpose, and make such crop as it is possible."

Here followed a colloquy between Mr. Minor and the court as to whether this was feasible; whether the water could get down to the complainant in time to do it any good, Mr. Minor saying that it could. Then Mr. Minor continued as follows (p. 460):

"I submit to your Honor, in common justice, we ought to have what these people say we shall have. If we cannot get that, then your Honor should give us what is nearest to it. And what is nearest to it is the use of the water for the balance of this year, without any let or hindrance from these parties, so that we may have some crops as well as they. And so that justice should be done in this case. Of course, these parties should be required to pay the costs, but

> the costs in the case are comparatively small. But I will say, so far as my client is concerned, I had a talk with Mr. Treadwell last evening before he left, that if your Honor should find these parties guilty of contempt, as we think your Honor must do under the evidence in this case—our client would be better satisfied to have the water the balance of this year than to have any punishment which your Honor can inflict upon these defendants, or any of them. And that, moreover, will teach these people the lesson that if they take what does not belong to them, they will have to give that which does belong to them. If they cannot restore what they have taken, then they can make it good by giving what they have of like kind."

Surely if the prayer of the petition in the Gompers case, praying that the petitioner might have relief, was held to be sufficient of itself to show that the proceeding was civil in its nature, then this argument of Mr. Minor's certainly shows the same thing in this present case. It is in effect as much a part of the prayer for relief as if it had been written at the end of the complaining affidavit.

On page 6 of the appellee's brief counsel points out that Judge Wolverton, at the close of his opinion, in which he directed that a fine of $250.00 be imposed upon Mr. Hanley, said:

> "This sum I consider in no way compensatory for plaintiff's loss but I impose it by way of warning against any further contempt of the kind."

And counsel argues that since the trial court said he imposed it by way of warning, therefore it shows that the fine was punitive and not remedial. This is a slight straw to seize upon when considered in the light of all the other things in the case earmarking it as a civil case. But even this straw may be brushed away by showing first that the fine of $250.00 was imposed *for the use of the plaintiff*. (Opinion p. 73 and decree p. 78). Not a cent of it went to the United States, which it would have to do to support any argument that this was a criminal case.

Furthermore, even if Judge Wolverton had fined Mr. Hanley any number of dollars, the fine to go to the United States, and even if he had imprisoned Mr. Hanley for a year, it would not have shown that this was a criminal case. It would simply have shown that Judge Wolverton, in a civil contempt case, had imposed a sentence for punitive purposes—a thing which he would have had no right or jurisdiction to do. That was the very point in the Gompers case. In that case the court sentenced the defendants to six months, nine months and one year's imprisonment, respectively, and the Supreme Court of the United States said that did not stamp the proceedings as criminal; it simply showed that the court had tried to administer punitive punishment

in a civil case and that it was without any shadow of right or jurisdiction to do such a thing, the Supreme Court saying (page 501):

> "The result was as fundamentally erroneous as if in an action of 'A vs. B, for assault and battery', the judgment entered had been that the defendant be confined in prison for twelve months."

Counsel, erroneously assuming that there is *some* punitive feature about this case, further says, on pages 5 and 6 of his brief, that where a case contains both punitive and remedial elements, the punitive features always dominate the case and fix its character for the purposes of review, and cites In re Merchants' Stock & Grain Co., 223 U. S. 639, 56 L. ed. 584; Kreplik v. Couch Patents Co., 190 Fed. 565; Continental Gin Co. v. Murray Co., 162 Fed. 873.

In the first of these cases, In re Merchants' Stock & Grain Company, fines of $1000, $2000 and $500 were imposed, three-fourths of which would go to the complainant as compensation and *one-fourth to the United States*, and the court properly held that in view of this punitive feature of a fine going to the United States, the case was properly reviewable on a writ of error, and directed the Circuit Court of Appeals, which had dismissed the case as being a civil one, to reinstate it and take jurisdiction of it.

In the second case above cited, Kreplik vs. Couch Patents Company, the only point was whether, in a case of criminal contempt, remedial relief could also be granted, and the court held that it could. It further appeared in that case that *at the special request of the defendant himself the case was treated as a criminal contempt.*

In the last case cited, Continental Gin Company vs. Murray Co., the only defense was that a contempt case for violation of an injunction against infringement of a patent and imposing a punitive fine in favor of the United States, was properly reviewable by writ of error and that on such review matters of fact could not be considered.

It is worth noting that in most of the cases cited by the appellee, especially those in the Supreme Court of the United States, the effect of the ruling is to *retain* the jurisdiction and give the parties an opportunity to be heard upon the merits, rather than to dismiss the appeal or the writ of error as the case may be.

PART II.

On the Merits.

The administration of justice is often (if not generally) hindered by an abundance of irrelevant detail in relation to the problems actually presented for solution. And this case is not free from such offending. Yielding first place to our energetic adversary we freely

accept our full share of responsibility in that regard. And then too, there are other facts which, while helpful in their proper relation, serve only to hinder, if allowed to intrude into illogical relations. Eliminating, as far as possible, the irrelevant and keeping each fact within the radius of its logical application, let us consider, each in its proper order, the several separate offenses charged against Mr. Hanley in this proceeding. And each of these offenses is separate. No one charge depends upon the other. And what is more important to be remembered is, that, the fact that several independent and unrelated charges are *made* at the same time does not establish any relation between them. The fact of the making of charges in that way does have a tendency to create an atmosphere antagonistic to the person against whom the charges are made. And that fact accounts for the making of unfounded charges. But each separate charge must stand by itself or must fall alone.

In order that the legal principles involved may stand out clearly and their application to the solution of the problem presented be unobscured, let us consider the case as though all that has occurred and which is made the basis of these several charges, had occurred the next day after the decree, which it is claimed has been violated, had been rendered. And there certainly cannot be any possible legal or logical objection to that. Lapse of time and change of condition cannot make that contempt now, which would not have been contempt then.

It must be borne in mind that Silvis River is not a

river of constant flow but is one of those fitful and uncertain streams made by the melting of mountain snow and depending therefore for its flow and flood time, upon the extent of the snow fall and the rapidity with which it melts. The river enters the west side of the Harney Valley from the north and flows southerly into Malheur Lake. After it enters the valley it divides into two forks known as the east and the west fork, and so flows into the lake. At the time the decree was rendered Mr. Hanley owned a large tract of land known as the "Bell A Ranch" through which ran the east fork of the river. Near the north end of this ranch he had a removable dam across the east fork of the river and connected with (and served by) this dam were two ditches, one leading to the east and the other to the west. A few miles below he had another ditch connected directly with the east fork (but no dam) leading east and known as the Drain Ditch, because it was for drainage purposes only. Mr. Altschul owned a tract of land on the west river not far from what is known as the Young Dam and designated as section twenty-nine. Farther down on the west fork Mr. Altschul also owned other land designated as sections five and thirty-one. Below the lands of Mr. Hanley and Mr. Altschul and on both forks of the river, the Pacific Live Stock Company owned large tracts of land aggregating many thousands of acres. There were many owners of land on the river above the Company's lands but none of these need be now considered.

In that situation the Company brought suit against Mr. Hanley and many others to enjoin them from using

water from the river. The sole basis of the Company's claim for relief was that it was a riparian owner on the stream below the defendants. Mr. Altschul was not a party to that suit nor are his lands mentioned or referred to in the proceedings. A decree was rendered fixing the various rights of the several parties involved and it is that decree which Mr. Hanley is here charged with having violated.

As said above, we are now to consider the case as through the things done which are charged as the several violations of the decree had been done the next day after the decree had been entered. In that situation and as to the Altschul lands Mr. Altschul must be substituted for Mr. Hanley as to the lands owned by him.

In paragraph 1 of the affidavit which is the basis of this proceeding beginning at page 17 Transcript of Record, it is charged that a Mr. Luig had a dam in the west fork of the river on Mr. Altschul's land (sec. 31) which served to irrigate Luig's land below, that he, Luig, used that dam to divert water from the river at times when, by the decree, he was prohibited from so doing and thereby committed contempt. It is then charged that Mr. Hanley "encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid." The evidence conclusively demonstrates and it stands as conceded, that Luig did not do any of the things charged against him and he was discharged. Now, since Luig was not guilty

of doing anything in violation of the decree it manifestly follows that no one could be convicted of the offense of assisting and encouraging him in the doing it. The thing charged as having been done was not done. Is that not the end of the matter?

This dam (call it the Luig dam or the 31-dam, it makes no difference here) was used, let us concede for argument, at times when Luig was forbidden by the decree to use it. But it was not used by Luig. In a spirit of fairness to Luig and in order to be open and frank with the court, Mr. Hanley says that he used the dam for the purpose of irrigating the Altschul land (sections 31 and 5). Recurring for a moment to the specific nature of the charge, upon which we are being tried, let it be supposed, for a moment, that this use of water on the Altschul land was a violation of a decree against Mr. Altschul; no such charge is here made against Mr. Hanley. All that is charged is, that Mr. Hanley assisted and encouraged a man in the doing of something which it is now admitted he did not do. It is fundamental that in such proceedings as this the charge must be definite, certain and specific as in any criminal charge and that the defendant cannot be held guilty of anything not so charged. As well might a man charged with encouraging advising and assisting another to steal a horse be convicted of himself stealing a cow. Even in a civil case the judgment must be within the pleadings. A judgment on open account could not be rendered in an action on a promissory note. It is therefore clear, upon the established and unquestioned principles of pleading and pro-

cedure both in civil as well as criminal cases, that the first charge as made cannot be sustained.

But suppose the facts as admitted had been properly made the definite basis of a specific charge of contempt! Here is a man who was not a party to the suit in which the decree was rendered, who owns land, which is not in any way involved in the proceedings and he takes water from the river for the irrigation of that land. It is wholly immaterial whether in fact and as against the Company he has a right so to take water or not. His right in that regard cannot be determined or considered here.

The second charge (Paragraph 2 of Affidavit, Record pp. 18 and 19) is in reference to what is known as the Young dam. It was declared in the decree that Mr. Young (who owned some land on the west fork) and two other parties might maintain a dam and ditches for the irrigation of certain described lands and their use of the dam was limited to certain prescribed times. The decree also provided that whatever water would naturally flow into these ditches, when the dam was open, might be used by those who had the right to maintain the dam. This dam was washed out and these parties built, in its stead, a new dam a short distance above. It is charged that these parties had no right to build a dam at any place except on the exact spot where the old one was, that they constructed the new dam so that when open it would divert more water than the old one and that they dug a new ditch connected with the dam whereby the flow of the water in their ditches, when the dam was

open, was increased. It is then charged that in all this, these parties acted under the advice and encouragement and with the assistance of Mr. Hanley. It is to be borne in mind that this dam (as, indeed all the others) consist of a wooden frame so placed in the stream as to sustain movable boards placed against it and held in place by the pressure of the water. This frame work rested upon a permanent board foundation set in the bottom of the stream. The dam is said to be "in" only when the movable boards are in place. In the charge as to the Luig dam the movable boards were in place but here the charge is predicated upon the contention that the permanent part of the dam was so constructed as that more water flowed into the ditches when the boards were out than was the case with the old dam and also that the new dam was not built on the exact site of the old one. There is no charge here that this dam had been used *as* a dam (that is, that the movable boards had been put in place) by any one. And there is no pretense that any water had been diverted by the permanent structure of this dam by Mr. Hanley, or into any ditch of his or onto any land owned or controlled by him or that he had the remotest interest in, or the least use of, any water which came from that dam.

But here, as in the Luig charge, the lands of Mr. Altschul (Sec. 29) are involved. And we are to consider the case as though all that is claimed as the basis of the charge had occurred the next day after the decree had been entered. In that aspect of the case

it stands as if Mr. Altschul were charged with contempt as the owner of the Young dam. Here then is a dam built after the decree had been entered and which is owned by Mr. Altschul who was not a party to the suit, to serve lands not mentioned in the proceedings. And there is no pretense that this dam is even located on the site of any dam that was mentioned in the decree. It goes without saying that in that situation Mr. Altschul could not be held for contempt. The question as to Mr. Altschul's right to use that dam for the irrigation of his land cannot be involved in this proceeding. He did not violate the decree, as charged or otherwise, and that is the end of the matter.

It is very clear that, as to these two charges, if Mr. Altschul had done all that Mr. Hanley is charged with having done he would not be guilty. How, then, is Mr. Hanley guilty? Mr. Hanley owns stock in

each of two corporations which own the Altschul lands. It is not pretended that these corporations were organized or are used as a subterfuge for the violation of the decree. Both corporations are bona fide business organizations in which other parties own substantial interests. But suppose Mr. Hanley personally owned the Altschul lands, he would have the very same rights as to these lands that Mr. Altschul had. The original suit was instituted as against certain rights of irrigation claimed and exercised by people on the river above the complainant. The *rights* thus claimed was the thing in issue—the rights, as relating to certain lands. And

it was that which was adjudicated. As to Mr. Hanley (and most if not all the others as well) certain dams and ditches were specifically mentioned. The suit did not relate to the personality of any of those who were made defendants but only to the rights claimed by them. These rights, as adjudicated, are expressed in the decree as relating to the particular person who then, so to say, owned that right, but beyond that right, the personality of him who owned it, is in no wise involved. The decree grants to Mr. Hanley, as the owner of certain land, dam and ditches, the right to take and use water from the river and specifies the nature and extent of that use and then declares that he shall not take any more water than granted by the decree. But this right is a property right. It is appurtenant to the land and is not personal to Mr. Hanley. And the prohibitive provisions of the decree likewise relate only to the rights involved and not to the personality of the man, as such, who may be then the owner of these rights. Mr. Hanley, as the owner of these rights, which were specifically mentioned in the decree, is enjoined from taking water from the river, except as provided by the decree. But Mr. Hanley, as a man and independent of these property rights, is not affected by the decree, and there is nothing which prevents him from acquiring and exercising other rights or claims to water from the river the same as though his name had never been mentioned in the decree. And so, even if Mr. Hanley were himself the owner of the Altschul lands, he would have the very same rights as Mr. Altschul. After the decree had been entered, Mr. Hanley bought a tract of

land on the river below, known as the Fennimore land, as to which a right of irrigation is claimed. Mr. Fennimore had not been made a party to the suit, nor were these lands involved in the proceeding—the situation was exactly the same as that of the Altschul lands. In 1905 Mr. Hanley was charged with contempt for having used water upon the Fennimore land. Judge Bellinger, in affirming Mr. Hanley's right so to use the water, said (Record, pp. 324-325):

> "On about the line between sections 2 and 3, in township 24 south, range 21 east, there was in the river channel an old check-gate known as the Fennimore check-gate, used to impede the flow of water so as to sub-irrigate the lands further up the river. This gate had become decayed and useless for the purpose intended. Hanley, since the decree in question was entered, having acquired the Fennimore land, put in a new check-gate a short distance above the old one.
>
> "The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley's act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding."

What has been said in reference to the relation of the decree to the personality of those named as defend-

ants applies equally to the dams, *as structures*, which are mentioned in the decree. The decree, though it specifies a particular dam, mentions it only with reference to the rights relating to it as involved in the suit. The dam, as a physical structure—a thing of timbers and boards—bears the same relation to the prohibitive effect of the decree as does the physical structure, so to say, of a man named in the decree. All the time it is the *right* which is involved—a particular right to take water from the river—and not the physical structure employed as the means of taking the water or the personality of the man who takes it. It is our contention that the structure known as the 31-dam, or the Luig dam, was the special structure employed for irrigation of the Altschul lands in sections 5 and 31, that it was built to take the place of a similar structure built in 1887 for the same purpose and that these lands have rights of irrigation utilized by means of these structures which have been exercised ever since the original dam was built. But, so far as this case is concerned, suppose that were not true and suppose this dam had been built by Mr. Luig and that it is the same dam mentioned in the decree as it declares Luig's rights! In that case Luig has certain rights of irrigation which he is permitted to exercise by means of this dam, but neither Luig, as a man, nor the dam, as a structure, is affected, as to other rights not involved in the suit nor referred to in the decree. In that situation of affairs Mr. Altschul uses this structure, known as the 31-dam, or the Luig dam, for the irrigation of his land. This use of the dam is entirely independent of

Luig and of any rights which he has or claims or of any rights in any way involved in the suit or affected by the decree. Of course Altschul could not acquire any right from or through Luig and there is no claim that he could. To state the case most strongly against us, grant that Altschul had no real right as against Luig to use the dam and his use of it cannot be tortured into a violation of the decree.

The Young dam, as known in these proceedings, was not mentioned in the decree and therefore, so far as its use for the Altschul land is concerned, it is an independent structure.

It is freely conceded by appellee at page 58 of its brief that the water rights of the Altschul land is in no way involved in this proceeding. And that is a very important matter to be borne in mind in the determination of the case. It is within this record that the water rights of everybody on the river is now in process of determination in the State Courts. A water right, in its relation to other such rights, depends upon the nature, extent and method of its use. The Altschul rights to, or in, the 31 or Luig dam, is a matter of much importance as relating to other rights and, since the Altschul water rights are not here involved, his right to that dam cannot be considered and Hanley's rights are Altschul's rights.

The other charges against Mr. Hanley involve his personal relation to the decree, and little remains to be said in reply, in addition to what has been said in our

original brief. All that is said by appellee in reference to the charges upon which Mr. Hanley was exonerated by the Court below, are entirely outside the limits of discussion. It is only the charges which were sustained below that are here for consideration.

The other charges relate to the twenty-one dam, the condition of the banks on the east fork of the river, as it flows through Mr. Hanley's land and to the drain ditch.

As to the twenty-one dam, it is charged that one board was allowed to remain in the dam and that brush was permitted to accumulate against the framework of the dam. This matter is fully discussed in our original brief, but special attention may be called to the fact that the one board was but six inches wide, extended but one fourth the distance across the river and was next the bank out of the current and in slack water, and that the brush was only a few small limbs of willow brush. But the absolutely conclusive fact in favor of Mr. Hanley is that these obstructions did not increase the division of water. These obstructions were removed as soon as Mr. Hanley knew they were there, which was before the 24th of April and, Mr. Griffing, who measured the outflow of the water, says that forty second feet was flowing into the 21-ditch from the first of April to the third of May (Record p. 94). It therefore conclusively appears that just as much water was diverted after as before the board and brush were removed.

The fact that Mr. Hanley did not open the banks of the river or do anything to increase the overflow or out-

flow is conclusively established. It also clearly appears that he had endeavored to repair breaks in the bank so as to confine the water to the channel. There has always been a natural overflow of the banks during high water and there are several breaks or openings in the banks. These have always been there and it has been Mr. Hanley's effort to keep them closed, both because it better serves for his own irrigation and also, as he says, in order to avoid, if possible, any cause or objection by the complainant. But Mr. Hanley is not under any legal obligation, either to close or to keep closed any natural opening in the bank of the river. The water shall flow as it was wont to flow and these openings in the bank afford as natural an outflow as the channel itself affords a natural onflow.

The only thing in addition to what is said in the original brief in reference to the drain ditch, that seems to call for attention, is the suggestion that the water in that ditch is of not the slightest use to Mr. Hanley. All the water that goes into that ditch is delivered directly on to the land of the complainant, and thence flows on down to its other lands below. Mr. Hanley has a right to use that ditch to drain water from his land whenever such drainage is necessary. The land from which the water is drained is hay land. The hay is put up and then the stock is brought onto the land for feeding. It was necessary to drain this land so that the stock could be fed there. And in the practical conduct of the business it is just as necessary to feed the stock there as it is to raise the hay.

A great deal is said by appellee about the diversion for the Fennimore land, about the Orphan Head Gate and ditch and about the Peoples Ditch, and the general complaint is made that the complainant has been short of water. But none of these things are relevant to the question really presented on this appeal.

Here are certain direct acts charged against Mr. Hanley as being in violation of a decree of the court. Each of these is regarded as a separate charge. And each must stand alone as though it were the only one that has been made. No one charge as such can lean upon another for support. It is respectfully submitted that not a single charge involved in this appeal has been sustained.

In conclusion, we call your Honor's attention to the fact that in that portion of the record which the appellee had printed are some matters which are not touched on in the record which appellant had printed, because appellant deemed them immaterial. If your Honors should deem any of them material it will not be fair to judge of them from the printed record alone—for appellant's printed record omits them, and appellee's printed record presents only one side of them. The reverse side of them can only be seen by reading the complete typewritten transcript of the testimony, which, pursuant to Judge Wolverton's order, was sent down for your Honors' inspection. We think all material matters are in appellant's printed record. If your Honors think otherwise, and conclude some of the matters in appellee's rec-

ord are material, then we respectfully ask that you read the typewritten transcript to get the other side of them.

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